

United States Postal Service and Sharon Jacqueline Lee. Case 16-CA-18520(P)

November 12, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

The issue in this case¹ is whether the judge erred in dismissing the complaint alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Sharon Jacqueline Lee, a former employee, because she filed a grievance against the Respondent during her initial employment. The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the General Counsel has failed to prove the allegation that the Respondent unlawfully refused to hire Sharon Lee in 1997 for a position at either the Groves or Port Neches, Texas post offices because she had filed a grievance over the denial of her request for a uniform allowance during a prior period of employment at Port Neches in 1994. Applying a *Wright Line*² analysis to the facts, we affirm the judge's finding that the 1994 grievance filing was not a motivating factor in the decisions of Groves Postmaster Levina Elmoore and Port Neches Postmaster William Robertson not to choose Lee from the five candidates for the two letter carrier positions. We further agree with the judge's alternative finding that, even assuming that Lee's grievance filing was a motivating factor in the decision not to hire her, the Respondent proved that it would not have hired Lee because of her prior poor work performance.

As noted, an issue in this case is whether Robertson failed to hire Lee on February 5, 1997, for a position at Port Neches, because of a grievance that Lee had filed in 1994. The General Counsel relies heavily on Lee's testimony. Lee testified that, on February 17, she called Robertson to ask, "[W]hy he didn't choose me, because I was a good worker and got along with everybody and had experience and never had any trouble." Robertson responded: "[Y]ou never had any trouble Well what about that grievance you filed against me The grievance about your uniform allowance."

There is no credibility conflict on this matter. As the judge correctly pointed out, Robertson was simply responding on February 17 to Lee's comment that she "never had any trouble." Assuming *arguendo* that the

"trouble" was the act of filing the grievance, this does not establish that the decision of February 5 was motivated by that "trouble." The inescapable fact is that Robertson testified that he decided on February 5 that he would not hire Lee because she "wasn't worth a shit." Robertson further testified that this opinion was based on her work and not on the grievance filing. In finding no violation, the judge obviously credited Robertson.

The judge did not ignore Robertson's remark of February 17. Even if Robertson considered the grievance activity to be "trouble," that comment, made almost 2 weeks after the decision, is not inconsistent with Robertson's merit-based mental processes on the day of the decision.

In sum, the General Counsel has not established his case that Robertson's decision was based on Lee's grievance activity.

A second issue in this case is whether Elmoore unlawfully failed to hire Lee for a position in Groves. Immediately after Robertson made his selection for the Port Neches position, Elmoore made her selection. She did not choose Lee either. Both Robertson and Elmoore deny that Lee's grievance activity was discussed at the time. There is no evidence that it was discussed.

On February 19, Lee called Elmoore to inquire about the Groves post office position. According to Lee, Elmoore said she asked Robertson if he would hire Lee and Robertson said "no." Lee then said: "I know the reason why he didn't hire me and it was because of my—of the—grievance I filed with the union over my uniform allowance." Lee said that Elmoore replied, "Well, when you're fixing to be terminated, you don't get the uniform allowance."

In sum, Lee made an allegation that Robertson failed to hire her because of the grievance activity. The bare accusation that Robertson acted unlawfully does not prove that he did so, and it surely does not prove that Elmoore acted unlawfully. To the contrary, Elmoore made her decision on February 5, and there was no reference to Lee's grievance activity at that time. Finally, Elmoore's response to Lee on February 19 was addressed solely to the merits of the grievance.

Thus, the General Counsel failed to establish a *prima facie* case as to the two decisions not to hire Lee. Further, as shown below, even if the General Counsel did establish that case, Respondent rebutted it.

Lee first worked as a transitional employee with Respondent from 1993 to 1994 at its Groves post office. James Tyler was her supervisor at this facility. In the only written evaluation of Lee's work, Tyler rated her overall performance as "good" after her first 30 days on the job. According to ratings checked by Tyler on the evaluation form, Tyler's work met, but did not exceed, expectations. Tyler testified, however, that he thereafter came to view Lee's casing skills as deficient. "Casing" is the process of sorting mail prior to street delivery. Lee

¹ On April 10, 1998, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

spent too much time casing and was not able to complete her delivery in a timely fashion.

After Lee's term expired at Groves, she took the transitional employee position at Port Neches under Postmaster Robertson. Both Robertson and Joyce Porter, a supervisor familiar with Lee's work, testified that Lee spent too much time in the office casing mail prior to delivery. Robertson also said that Lee made some misdeliveries. He claimed to have discussed Lee's performance with her on two occasions.

Lee denied having any discussions about her performance with Robertson. But, even if Robertson did not have these conversations, it is clear that Lee was an employee with performance problems. Indeed, she did not deny having general work problems. To the contrary, she admitted that Tyler criticized her need for casing assistance. Subsequent to this incident, Tyler accused Lee of insubordinate conduct and warned that he would write her up if she ever did it again. Lee did not deny the warning. She simply could not recall what she had said that drew this reaction from Tyler.

In sum, the evidence clearly shows that Lee's casing skills were deficient. Even Lee's testimony provides corroboration on this point. Furthermore, it is undisputed that Supervisor Tyler and Robertson expressed negative views of Lee's ability when they spoke to Elmoore during the 1997 hiring process. They both concluded they would not hire Lee. Under these circumstances, we think that this evidence supports the judge's conclusion that Lee was a poor worker whom the Respondent would not have hired even in the absence of her protected grievance filing.

Our dissenting colleague finds significance in the lack of documentation substantiating management testimony about Lee's shortcomings. The record does not support the claim that the Respondent had a consistent past practice of documenting employee problems. Robertson was the only witness who testified on this point. He testified that, as a general matter, written disciplinary notices were placed in employee files "whenever I felt it necessary . . . [and] in terms of casing and stuff like that [Lee's job], what I usually do is leave it to the supervisor." There is no evidence that Robertson or his supervisors felt it necessary to always keep written records of an employee's work inadequacies.

Finally, we attach no significance to Lee's brief and not fully developed testimony that she trained three new employees at Port Neches. Her testimony sheds little light on the extent of such training. Although the dissent and General Counsel urge that Respondent would not logically use a poorly performing worker to train other employees, we find no logical inconsistency on the record presented. There is no claim that Lee lacked the *knowledge* about how to case or about any other aspect of the letter carrier's job. That she could communicate this information about the job to others does not rebut the

substantial evidence that she herself did not in fact perform the job well. There is a meaningful difference between knowing how to case mail for a delivery route and actually doing it quickly and efficiently.

In sum, we find the judge's findings and conclusions well supported by a preponderance of the entire record. There are no outstanding evidentiary issues whose resolution would warrant a different result. We shall therefore adopt his recommendation to dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER FOX, dissenting.

I dissent from my colleagues' adoption of the judge's dismissal of the complaint in this case because I would find that the judge failed to make credibility findings crucial to two dispositive issues: (1) whether the General Counsel established a *prima facie* case, i.e., showed that animus against Charging Party Lee's grievance filing was a motivating factor in the Respondent's failure, in 1997, to hire her into a transitional employee position; and (2) whether the Respondent established that it would not have hired her into the position even in the absence of her protected grievance filing. I would remand for the requisite credibility findings.¹

Lee was rejected for a transitional employee position at the Port Neches Post Office by Postmaster William Robertson and a similar position at the Groves Post Office by Postmaster Levina Elmoore. It is undisputed that, when asked by Lee why he had failed to hire her, Robertson cited her previous grievance filing "against me" as an example of "trouble" she had caused. The judge found that Robertson told Elmoore, before she too rejected Lee, that Lee "wasn't worth a shit" but that Robertson had said nothing about Lee's grievance filing. The judge failed to acknowledge testimony by Lee that, before the hiring decision, Elmoore had commented on the substance of Lee's grievance, providing the basis for a reasonable inference that Elmoore had known of the grievance. I would find that Lee's testimony concerning Robertson's statement supports a finding that animus played a part in his decision, and I would remand for a credibility resolution regarding Lee's testimony about Elmoore.²

¹ In view of the judge's failure to acknowledge the conflicts in the evidence detailed below, I do not agree with my colleagues that the judge had in fact discredited the testimony on which the General Counsel relies.

² Although the judge stated that "Elmoore knew nothing about Lee's 1994 grievance at the time of the February 1997 interview," it is not clear that the judge considered and discredited Lee's testimony about Elmoore's previous discussion with Lee about uniform allowances, the subject of her earlier grievance. I would also note that, even if Elmoore did not know of the grievance, if she relied on Robertson's assessment of Lee and that assessment itself was discriminatorily motivated, it would be appropriate to find that Elmoore's decision was also discrimi-

In finding that the Respondent also established, as an affirmative defense under *Wright Line*,³ that Lee would, in any event, have been rejected for hire because of her poor performance in “casing” mail during previous temporary assignments, the judge also ignored certain evidence and failed to resolve conflicts in testimony about matters that could affect this conclusion. The judge relied on testimony by two supervisors (Tyler and Porter) and Postmaster Robertson that Lee had been slow in casing mail. If, in fact, Lee’s performance had been significantly deficient in that respect, however, one would expect that the deficiencies would have been recorded in Lee’s personnel record or at least mentioned to her at the time. The judge ignored testimony that, under the Respondent’s practice, if a supervisor found fault with an employee’s work performance, the deficiency would be described in writing and placed in the employee’s personnel file. No documentary evidence of this kind was submitted by the Respondent.⁴ Although the judge mentioned testimony by Robertson that when Lee had worked for him in 1994, he had twice talked to her about her slow casing, the judge also noted Lee’s testimony that Robertson had never talked to her about it. The judge failed to make an express credibility finding on this point.

I would also ask the judge to consider, on remand, the significance of uncontradicted testimony that Lee had been called on to train new employees in their duties, including the casing of mail, and that the Respondent had continued to use Lee’s services after her casing deficiencies supposedly became apparent, but before her filing of the grievance that angered Robertson.

In sum, in my view, the above-mentioned matters need to be resolved by the judge before a decision can be made whether to find a violation in this case. I therefore dissent from the dismissal of the complaint.

Robert G. Levy, II, Esq., for the General Counsel.

Philip W. Eglsaer, Esq., of Memphis, Tennessee, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. The sole issue in this simple case is whether Sharon Jacqueline Lee, a former temporary postal service employee from 1993 to 1995, was passed over for employment for another temporary posi-

natory. *JMC Transport v. NLRB*, 776 F.2d, 612, 619 (6th Cir. 1985), and cases there cited.

³ 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁴ I do not agree with my colleagues that Robertson’s testimony that “in terms of casing and stuff like that,” he would “leave it to the supervisor” signified that such a supervisor would not follow the employer’s practice, described by Robertson, of describing work deficiencies in writing and placing them in the employee’s personnel file.

tion in 1997 because she filed a grievance during her initial work stint, thus violating Section 8(a)(1) and (3) of the National Labor Relations Act. Shortly after her unsuccessful attempt to reobtain employment, Lee filed a charge on February 26, 1997, and the General Counsel issued its complaint on September 17, 1997. The Respondent, the United States Postal Service, filed its answer on October 1, 1997, denying that Lee’s grievance “played any part” in the decision not to hire her in 1997.

The trial in this case was held on January 27, 1998, in Port Arthur, Texas, during which the General Counsel and the Respondent each called three witnesses. Then, briefs were filed by the General Counsel and the Respondent on March 2 and 16, 1998, respectively.

II. FINDINGS OF FACT

The United States Postal Service uses transitional employees, who work for up to 359 days at a time, because they cost less than a permanent employee (Tr. 15–17). Sharon Lee was hired as a transitional employee on May 15, 1993, to work at the Groves, Texas Post Office as a letter carrier. After 30 days on the job, her supervisor, James Tyler, rated her overall performance as “good” (G.C. Exh. 2). But as her tenure continued, Tyler found her “casing” skills—the sorting of the mail in preparation for street delivery—as deficient (Tr. 89–90). Lee’s tenure at the Groves Post Office ended in mid-1994 (Tr. 39). A few days later, Lee obtained another transitional position at the nearby Port Neches, Texas Post Office. There, Lee was assigned as a letter carrier on Auxiliary Route 5111, which involved about half the work of that facility’s other dozen routes (Tr. 23–24). The Port Neches Postmaster, William Robertson, also found Lee’s casing ability to be slow and, to that end, he talked with her twice in late 1994. But her performance did not improve (Tr. 25–27). According to Lee, however, Robertson never talked to her about her job performance (Tr. 44).

Transitional employees are paid a \$57 uniform allowance after every 90 days on the job. This is an important job benefit because letter carriers need changes of uniform during a workweek. Lee received this allowance during her tenure at Groves (Tr. 56–57). Around November 12, 1994, Robertson told Lee that her last day as a transitional employee at Port Neches would be November 20. Then, on November 14, which was after 90 days on the job at Port Neches, Lee asked Robertson for her uniform allowance. Robertson denied her request. Lee then asked again on November 15, and Robertson’s response was the same (Tr. 53–54, 71–73, 118–119). But Lee bought a uniform with her own money and presented the \$58.41 bill to Robertson. Lee did this because she believed that “I earned it.” (Tr. 75; R. Exh. 2). This made Robertson “highly upset” (Tr. 119). So, he wrote a letter to Lee, dated November 17, stating that she was ineligible for reimbursement because “you are scheduled for termination as a TE on November 20, 1994” and that “it does not make good since [sic] for me as a manager to pay for your clothing allowance under the circumstances.” (R. Exh. 1.) Indeed, U.S. Postal Service rules state that “Postmasters/supervisors must use discretion in approving payments for employees with less than 30 days remaining in their appointments and who are not expected to be rehired for another appointment.” (R. Exh. 3.) After refusing to pay the bill, Robertson told Lee to “grieve it.” And Lee did, but she was unsuccessful though step 2 of the grievance procedure (Tr. 55, 130–131).

Although Lee's appointment as a temporary employee expired in November 1994, she continued to work at the Port Neches Post Office as a "casual employee" until June 1995. Robertson knew in November 1994 that Lee would stay on in this capacity (Tr. 133). Casual employees work by the hour with no benefits, and do not receive a uniform allowance (Tr. 76-77, 133). According to Joyce Porter, who was Lee's supervisor at Port Neches, Lee was slow at casing the mail (Tr. 93-95).

Lee kept looking for work with the U.S. Postal Service after June 1995. When other transitional positions opened up at both the Port Neches and Groves facilities, Lee's name appeared on a register with four other people, none of whom had prior experience with the Postal Service. Robertson conducted the interviews of these five people on February 5, 1997, along with Levina Elmoore, the new postmaster at Groves (Tr. 46, 48, 101, 111). Robertson had already decided before the interview that he did not want to select Lee because Lee "wasn't worth a shit." According to Robertson, the grievance filed by Lee in 1994 was irrelevant to his opinion of Lee (Tr. 112, 123-126). Before the interview, Elmoore asked Tyler about Lee and Tyler opined that Lee was not a good letter carrier (Tr. 91, 101-104). Robertson did not discuss Lee with Elmoore before the interview. Robertson and Elmoore then interviewed all five people on February 5. Robertson and Elmore both wanted a Mr. McKenery, but because Robertson got to pick first he selected Mr. McKenery for the Port Neches job. It was then Elmoore's turn to select from the remaining group of four people for the Groves job. Elmoore then asked Robertson for his opinion of Lee. Robertson told Elmoore that Lee "wasn't worth a shit." But Robertson did not discuss Lee's 1994 grievance matter with Elmoore. Elmoore then selected Mr. Dang. Neither McKenery nor Dang had any prior postal experience (Tr. 22-23, 98-105, 111, 125, 129). According to Robertson, both McKenery and Dang performed "very good" during the interview. Moreover, Robertson felt that Lee was arrogant during the interview, assuming the job was hers because she had prior experience (Tr. 124.)

After the interviews, Lee heard that she was not selected for either job. So she called Elmoore on February 14, and Elmoore told her that no final decision was made yet. Then she called Robertson on February 17, asking why she apparently was not chosen. Lee specifically told him she was a good worker who never had any trouble. But according to Lee, Robertson said, "You never had any trouble Well, what about that grievance you filed against me The grievance over your uniform allowance." (Tr. 51-53.) Then, on February 17, Lee called Elmoore again, who confirmed that neither Robertson nor Elmoore wanted to hire her (Tr. 61, 107). Lee then filed her charge with the National Labor Relations Board on February 26, 1997.

Roxie Sanford is another transitional employee at the Groves Post Office. According to Sanford, her supervisor, James Tyler, cautioned her in January 1997 against going to the Union about grievances. Specifically, Tyler told her that the Union was "the enemy" and that dealings with the Union could cause her to lose her job. Elmoore also attended this meeting. After Tyler's remarks, Elmoore told Sanford that, "[w]e didn't mean anything by that." (Tr. 79-85.)

III. ANALYSIS

The General Counsel alleges that Robertson and Elmoore refused to hire Lee in 1997 because of Lee's membership in the National Association of Letter Carriers (the Union) and her filing of a grievance in 1994 concerning the uniform allowance. To prove these allegations, the General Counsel must establish, by a preponderance of the record evidence, that the employee's protected activity was a motivating factor in the decision not to hire Lee. If this is so established, the burden shifts to the employer to show, also by a preponderance of the evidence, that the decision not to hire Lee was based on a lawful reason unrelated to Lee's protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

Upon a thorough review of the evidence, the presiding judge concludes that the General Counsel has failed to establish that Lee's protected activity contributed to Robertson's or Elmoore's decisions to reject her for the 1997 transitional employee jobs. First, the record is silent on whether Lee ever has been a member of the National Association of Letter Carriers. Thus, it cannot be concluded that any decisions by the Respondent were based on her union membership. Second, there is insufficient evidence that Port Neches Postmaster Robertson held the 1994 grievance filing against Lee in rejecting her for the 1997 job. The General Counsel's most potent evidence is Robertson's un rebutted February 17, 1997 remark to Lee, after the February 5 interview: "You never had any trouble Well, what about that grievance you filed against me The grievance over your uniform allowance." But Robertson's remark refers to the substantive controversy underlying the grievance as much as the protected activity itself. Also, it is significant that Lee continued to work for Robertson after the 1994 grievance, albeit as a casual employee. It is also significant that Robertson's decision to end Lee's transitional employee status was made before the uniform controversy arose. Further, Robertson did not attempt to torpedo Lee's chance for the Groves job in 1997: he volunteered his opinion about Lee to Elmoore only after being asked by Elmoore. Third, there is absolutely no evidence that Groves Postmaster Elmoore declined to hire Lee because of Lee's 1994 grievance filing. Elmoore knew nothing about Lee's 1994 grievance at the time of the February 1997 interview. Rather, she simply relied on Robertson's objective opinion of Lee's casing ability in rejecting Lee. Although Elmoore also relied on Tyler's negative opinion of Lee's casing ability, there is simply insufficient evidence to connect Tyler's antiunion animus with Elmoore's decision to reject Lee. Indeed, although Elmoore was present during Supervisor Tyler's January 1997 antiunion tirade with letter carrier Sanford, Elmoore disassociated herself from Tyler's remarks by telling Sanford, "We didn't mean anything by that."

Even if the General Counsel had met its burden of showing that Lee's 1994 protected activity caused Robertson and/or Elmoore to reject her 1997 job application, the plain fact is that Lee was not hired in 1997 because of her poor casing ability, which is a very important part of a letter carrier's job. Indeed, three different supervisors at two different job locations all found Lee's casing ability to be below average: Port Neches Postmaster Robertson, Groves Supervisor Tyler, and Port Neches Supervisor Joyce Porter. As for Tyler's initial 30-day

rating of Lee's job ability as good, it was only an initial rating and is clearly vitiated by Tyler's later, and more comprehensive, opinion. In sum, there is plenty of objective evidence that Lee was a below average letter carrier, and that this was the reason she failed to secure a job in 1997.

As a final matter, it cannot be concluded that Lee's rejection for transitional positions at both the Groves and Port Neches Post Offices is suspicious because she was the only one of the five applicants in February 1997 with prior postal experience. In this regard, the General Counsel has failed to establish that either of the two people hired—McKenery and Dang—was unqualified. Also, there has been no showing that the letter carrier job is a skilled position for which prior experience would be a clear asset. Moreover, Robertson credibly testified that Lee possessed a bad attitude during the interview. Thus, the evidence does not show any impermissible disparate treatment of Lee.

CONCLUSIONS OF LAW

1. The Respondent, the United States Postal Service, is subject to the jurisdiction of the National Labor Relations Board pursuant to 39 U.S.C. § 1209(a).

2. The Respondent did not violate Section 8(a)(1) and (3) of the Act by failing to hire Sharon Jacqueline Lee in February 1997.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

Accordingly, it is ordered that the General Counsel's complaint is dismissed.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.